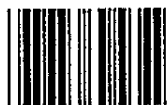


US DISTRICT COURT INDEX SHEET



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COUNTY OF SAN DIEGO

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JUN 30 1997

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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANN PRICE, et al.) No. 94-1917-R(AJB)
Plaintiff,)
v.) MEMORANDUM OF POINTS AND
COUNTY OF SAN DIEGO, et al.,) AUTHORITIES IN OPPOSITION TO
Defendants.) PLAINTIFFS' IN LIMINE MOTION TO
EXCLUDE UCSD STUDY AND EXPERT
TESTIMONY OF THOMAS NEWMAN, M.D.
[1 OF 7]
Hearing Date: October 6, 1997
Time: 10:30 a.m.
Place: Courtroom 5
Trial Date: November 4, 1997

The testimony of Thomas Neuman, M.D., and the UCSD pulmonology study are admissible under Federal Rules of Evidence 702, 703 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). In the present matter, the defendants' expert scientific evidence will enable the trier of fact to decide the issue of decedent's cause of death. Decedent Daniel Price ("Price"), died two days after he violently confronted deputies and was placed in a hogtie. Plaintiffs contend that Price died from asphyxiation induced by the hogtie. The seminal issue in this case is whether the hogtie causes asphyxiation. Absent such causation there is no liability for

1 wrongful death because plaintiff will be unable to attribute the death
2 to any police tactic. As fully discussed in the County's summary
3 judgment memorandum dated September 3, 1996, at page 4, even
4 plaintiffs' police procedures expert concedes that the force used to
5 control Price was necessary and reasonable. The sole criticism of the
6 officers was tied to their use of the hogtie restraint.

7 To be admissible as evidence, expert scientific testimony must
8 reflect scientific knowledge having been derived by the scientific
9 method such as to amount to good evidence, and advance a material
10 aspect of the case. In determining whether the scientific evidence is
11 reliable the courts consider a multitude of factors such as whether
12 the expert is testifying about a matter within his expertise, whether
13 the expert's theory is generally accepted within the scientific
14 community, whether the expert's methodology for any experiment
15 utilized to advance his opinions was generally accepted in the
16 scientific community, whether the expert's findings were subject to
17 peer review for validation, and whether the expert's opinion is based
18 on work with a known or potential rate of error which is acceptable.
19 *Id.* at 1315. The defendants' evidence satisfies all of Daubert's
20 requirements.

21 The study has been subjected to intense peer review. In addition
22 to the study's review by the UCSD Medical Center's Human Subject's
23 Committee, which was discussed in the County's September 3, 1996,
24 memorandum of points and authorities in support of summary judgment
25 motion at page 11, in May 1997, the study was presented at the annual
26 Society for Academic Emergency Medicine conference in Washington, D.C.
27 An abstract of the study was published in the journal of Academic
28 Emergency Medicine, Vol. 4, No. 5. A complete copy of the UCSD study

1 has been accepted and edited for publication in the Annals of
2 Emergency Medicine. Recently, in the spring of 1997, plaintiffs'
3 expert, Donald Reay, M.D., who promulgated the hypothesis that the
4 hogtie precipitates asphyxiation, contacted defendants' expert Dr.
5 Neuman and acknowledged that the UCSD study was authoritative.
6 Submitted herewith is an audiotape of Dr. Reay's voice-mail message to
7 Dr. Neuman wherein Dr. Reay concedes that his prior work on positional
8 asphyxia has been refuted by the UCSD study. Dr. Reay has also asked
9 Dr. Newman's permission to cite the study in an article Dr. Reay
10 anticipates writing which acknowledges that the hogtie is a
11 physiologically neutral restraint.¹

12 Relative to the study's methodology, plaintiffs have had ample
13 opportunity to critique the UCSD study, but they still make no adverse
14 comment about its scientific methodology or accuracy or even Dr.
15 Neuman's credentials to testify about the involved pulmonological
16 issues. Dr. Reay's declaration dated September 24, 1996, does not
17 challenge the propriety of the UCSD study. Indeed, since that
18 declaration, Dr. Reay has conceded that the UCSD study has refuted his
19 positional asphyxia hypothesis and desires to cite it in an article
20 wherein he will retract his posture on the hogtie by describing it as
21 a neutral restraint.

22 Under the auspices of the University of California San Diego
23 Medical Center, Dr. Neuman conducted a study to ascertain the effect,
24 if any, of the hogtie on respiration and pulmonary gas exchange. This
25 was done because asphyxiation is defined as a decrease in arterial
26

27 ¹ Dr. Reay's admission that his work on the hogtie has been
28 refuted constitutes the kind of subsequently developed evidence
that would warrant reconsideration of defendants' summary
judgment motion.

1 blood oxygen with a corresponding increase in carbon dioxide. That
2 study, is the first to collect pulmonological data specifically
3 addressing the merits of Dr. Reay's causation hypothesis. The study
4 showed there is absolutely no physiological evidence that the hogtie
5 restraint reduces oxygen and increases carbon dioxide levels. The
6 study demonstrated the hogtie's effects on ventilation had no clinical
7 import because there is no interference with pulmonary gas
8 exchange function and the measurements remained within normal range.
9 The study also demonstrated that pulmonary gas exchange improved with
10 exercise, and even while subjects were in the prone position while
11 hogtied.

12 UCSD's study on the subject thus revealed that Dr. Reay's work on
13 hogtying and asphyxiation suffered from three fundamental errors.
14 First, Dr. Reay did not spirometrical assessment of his subjects. He
15 therefore had no foundational basis upon which to say how much the
16 hogtie restraint interferes with ventilation (breathing) or whether
17 the restraint had any impact of blood gas exchange. Second, Reay
18 reported that oxygen saturation dropped with exercise. He could not
19 explain this anomaly which is inconsistent with Comroe's medical text
20 book on respiratory physiology which teaches arterial blood oxygen
21 levels actually increase with exertion. Third, although Dr. Reay
22 acknowledged that arterial PO2 measurements are the only accurate way
23 to ascertain true oxygen saturation levels, he never measured arterial
24 PO2 levels in the subjects he used to illustrate his hypotheses.

25 Plaintiffs argue that the study and testimony are inadmissible
26 because they involve an experiment that did not duplicate the exact
27
28

1 That UCSD's study does not duplicate the circumstances of Price's
2 encounter with the deputies is not determinative of its admissibility.
3 Substantial similarity goes to the weight to be given to the evidence
4 not its admissibility. *Randall, supra* at 1234.

5 The defendants' scientific evidence shows plaintiffs' contention
6 that death resulted from hogtie induced asphyxia is not based on sound
7 medical principles. This is what the UCSD study addressed and
8 irrefutably established. Pursuant to Federal Rules of Evidence 402,
9 702, 703 and *Daubert*, the study and Dr. Neuman's testimony are
10 admissible. Plaintiffs' motion to exclude that evidence should be
11 denied.

12 DATED: June 30/97

Respectfully submitted,

13 JOHN J. SANSONE, County Counsel
14 DIANE BARDSLEY, Chief Deputy

15 By 

16 RICKY R. SANCHEZ, Deputy
17 Attorneys for Defendants County of San Diego,
18 Jim Roache, John Groff, Steven Clause,
19 Mark Talley and Samuel Sheppard
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7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10

11 ANN PRICE, an individual; et al.,)	No. 94-1917-R(AJB)
12 Plaintiffs,)	DECLARATION OF SERVICE BY MAIL
13 v.)	
14 COUNTY OF SAN DIEGO; et al.)	
15 Defendants.)	
16 _____)	

17 I, ANA DOMINGUEZ, declare that: I am over the age of eighteen
18 years and not a party to the case; I am employed in, or am a resident
19 of, the County of San Diego, California where the mailing occurs; and
20 my business address is: 1600 Pacific Highway, Room 355, San Diego,
21 California.

22 I further declare that I am readily familiar with the business
23 practice for collection and processing of correspondence for mailing
24 with the United States Postal Service; and that the correspondence
25 shall be deposited with the United States Postal Service this same day
26 in the ordinary course of business.

27 ///

28 ///

1 I caused to be served the following document(s):

2 1. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO IN
3 LIMINE MOTION TO EXCLUDE UCSD PULMONOLOGY STUDY AND EXPERT TESTIMONY
4 OF THOMAS NEWMAN, M.D. [1 OF 7];

5 2. NOTICE OF LODGEMENT IN SUPPORT OF OPPOSITION TO IN LIMINE
6 MOTION TO EXCLUDE UCSD PULMONOLOGY STUDY AND EXPERT TESTIMONY OF
7 THOMAS NEWMAN, M.D. [1 OF 7];

8 3. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
9 PLAINTIFFS' IN LIMINE MOTION TO EXCLUDE PSYCHOLOGICAL RECORDS AND
10 TESTIMONY [2 OF 7];

11 4. DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN
12 OPPOSITION TO PLAINTIFFS' IN LIMINE MOTION TO EXCLUDE DRUG USE
13 EVIDENCE [3 OF 7];

14 5. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION
15 TO EXCLUDE COLLATERAL SOURCES [4 OF 7];

16 6. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
17 PLAINTIFFS' IN LIMINE MOTION TO EXCLUDE EVIDENCE OF PLAINTIFFS' POLICE
18 PROCEDURES EXPERTS' EARNINGS AND DISCIPLINE [5 of 7]

19 7. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
20 PLAINTIFFS' IN LIMINE MOTION TO EXCLUDE EVIDENCE OF PRE-INCIDENT LAW
21 ENFORCEMENT INVESTIGATION [6 of 7];

22 8. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
23 PLAINTIFFS' IN LIMINE MOTION TO EXCLUDE EXPERT OPINION TESTIMONY OF
24 DR. JAMES OTOSHI
25 [7 of 7];

26 by placing a true copy of each document in a separate envelope
27 addressed to each addressee, respectively, as follows:

28 Charles R. Woods, Esq.
TROST, STREET, WOODS & MESSINA
1202 Kettner Boulevard, Ste. 4300
San Diego, California 92101
(619) 233-7633

I then sealed each envelope and, with the postage thereon
fully prepaid, I placed each for deposit in the United States

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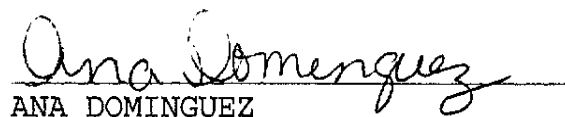
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1 Postal Service, this same day, at my business address shown
2 above, following ordinary business practices.

3 I declare under penalty of perjury under the laws of the
4 State of California that the foregoing is true and correct.

5
6 Executed on June 30, 1997


ANA DOMINGUEZ